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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

This petition implicates the strong federal interests in the uniform and speedy resolution of labor disputes and presents for review the following two questions as to which the United States Courts of Appeals are in clear conflict:

1. Whether an action to compel a party to return to labor arbitration should be subject to at least some statute of limitations.

2. Whether actions to compel labor arbitration, including those characterized as actions to compel a return to arbitration, should be subject to the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), as opposed to the diverse limitations provisions of the various states.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.1 of the Supreme Court Rules, John Morrell & Co. states that it is a wholly-owned subsidiary of Chiquita Brands International, Inc.

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LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Morrell & Co. ("Morrell") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 992 F.2d 205 (8th Cir. 1993) and

is reprinted at A-1 of the Appendix. The opinion of the United States District Court for the District of South Dakota, granting Morrell's motion for declaratory judgment, is reprinted at A-5.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals denied Morrell's petition for rehearing and suggestion for rehearing en banc on July 19, 1993. This petition is being filed on October 15, 1993.

STATUTORY PROVISIONS INVOLVED

This case involves Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), and Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a). Section 10(b) of the National Labor Relations Act provides, in pertinent part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

Section 301(a) of the Labor Management Relations Act provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This petition involves a clear conflict in the Courts of Appeals concerning the limitations periods applicable to actions to compel labor arbitration, particularly those characterized as actions to compel a "return" to arbitration. The split in the circuits on the issues presented undermines the federal policies favoring the uniform and speedy resolution of labor disputes.

Morrell's petition arises from certain events relating to two strikes at Morrell's Sioux Falls, South Dakota plant in 1986 and 1987. Various issues relating to these strikes have been the subject of prior litigation between the parties.[1] This petition sets forth only the facts and procedural history necessary to understand the context in which the issues presented for review arose.

Morrell is a corporation engaged in meat processing and packing. At the time of the events in question, Morrell's Sioux Falls plant was one of the nation's largest meat packing facilities, employing approximately 3,000 workers. Morrell hourly workers are represented by respondent labor unions, Local 304A of the United Food and Commercial Workers Union and the UFCW International Union, AFL-CIO and CLC (the "unions").

In August of 1986, the unions engaged in their first strike at the Sioux Falls plant. *Morrell II*, 913 F.2d at 548. Morrell sued the unions, alleging that the strikes were in breach of the no-strike clause contained in the parties' 1985-88 collective bargaining agreement ("Agreement"). While this action was still pending, the unions engaged in the second strike, which lasted

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[1]The facts and decisions relevant to those actions are reported at *John Morrell & Co. v. Local Union 304A*, 708 F. Supp. 273, 275 (D.S.D. 1989) and *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991) ("Morrell II"). In *John Morrell & Co. v. Local Union 304A*. 804 F.2d 457 (8th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987) ("Morrell I"), the Eighth Circuit vacated a preliminary injunction concerning the 1986 strike at Morrell's Sioux Falls plant.

from May through November of 1987. *Morrell II*, 913 F.2d at 549. In March 1988, a jury found that both strikes violated the Agreement's no-strike clause. *Id.*

After the second strike began, Morrell hired replacements for the strikers. When that strike ended, the unions demanded that Morrell immediately reinstate the striking workers, even if it meant firing the replacement workers. *Id.* Morrell refused to displace the replacement workers, but did place the strikers on a recall list and, as jobs became available, rehired the striking workers. The unions filed grievances on behalf of their members, protesting Morrell's refusal to recall the strikers immediately. *Id.*

An arbitrator heard the unions' grievances in August of 1988, several months after the liability jury had found the strikes to be in breach of the Agreement. The arbitrator found, contrary to the prior jury determination, that the strikes were not in breach of the Agreement. Based on that finding, the arbitrator went on to rule that Morrell was obligated to recall the strikers. *Id.*

Morrell promptly filed a new action in the district court in South Dakota to vacate the arbitrator's decision. *Id.* The district court overturned the arbitrator's award because: (1) Morrell had not agreed to arbitrate whether the strikes were in breach of the Agreement and (2) principles of collateral estoppel mandated that the award be vacated because it was inconsistent with the prior jury verdict that the strikes were in breach of the Agreement. *Morrell II*, 708 F. Supp. at 275.

Morrell's breach of contract action and its suit to vacate the arbitrator's award were consolidated on appeal before the Eighth Circuit. *Morrell II*, 913 F.2d at 549. The Eighth Circuit affirmed both the jury's determination that the strikes were in breach of the Agreement and the district court's reversal of the arbitration award. *Id.* at 544. This Court denied the unions' subsequent petition for writ of certiorari. *Morrell II*, 913 F.2d 544, *cert. denied*, 111 S. Ct. 1638 (1991).

After this Court denied the petition for a writ of certiorari, the unions demanded that Morrell return to arbitration

concerning the alleged recall rights of the strikers. Morrell rejected the unions' demand in July 1991, taking the position that there were no remaining arbitrable issues. The unions took no action in response to Morrell's refusal to arbitrate. The unions never attempted to resume the arbitration. Nor did they file suit to compel a return to arbitration.

Morrell subsequently filed a declaratory judgment action in the United States District Court for the District of South Dakota and sought a ruling that there were no remaining arbitrable issues and that any action to compel a return to arbitration would be barred by the six-month statute of limitations found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The district court ruled that Morrell had no obligation to return to arbitration. The Eighth Circuit reversed. The Eighth Circuit agreed with the unions' characterization of their arbitration demand as one for a return to arbitration, a ruling that Morrell does not contest here. Having so ruled, the court further held that no statute of limitations whatsoever governed such actions. *John Morrell & Co. v. Local Union 304A*, 992 F.2d 205, 207 n.3 (8th Cir. 1993) ("Morrell III"). Over the dissent of two judges, the Eighth Circuit subsequently denied Morrell's petition for rehearing and suggestion for rehearing en banc.[2]

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal labor law on which the United States Courts of Appeals are split. First, should at least some statute of limitations apply to actions to compel a return to labor arbitration? In the case below, the Eighth Circuit held that no statute of limitations applied. The court rejected Morrell's argument that such an action should be treated no differently than other actions to compel arbitration and, therefore, must be subject to some statute of limitations to assure the enforcement of the important federal labor policies of

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[2] Judges Magill and Beam voted in favor of granting Morrell's petition for rehearing en banc.

rapid and uniform resolution of labor disputes. *Morrell III*, 992 F.2d at 207 n.3. The Eighth Circuit's rule is contrary to decisions in the Fifth, Seventh, and Eleventh Circuits, which have recognized that national labor policy requires the prompt resolution of labor disputes and have ruled that actions to compel a return to arbitration are subject to statutes of limitations just as other actions to compel arbitration. *See Aluminum Brick and Glass Workers Int'l Union Local 674 v. A.P. Green Refractories, Inc.*, 895 F.2d 1053, 1055-1056 (5th Cir. 1990); *Alberici-Eby v. Local 520 Int'l Union of Operating Engineers*, 992 F.2d 727, 731-732 (7th Cir. 1993); *Aluminum Brick and Glass Workers Int'l Union v. AAA Plumbing Pottery Corp.*, 991 F.2d 1545, 1548-1549 (11th Cir. 1993).

Second, if actions to compel a return to arbitration are treated like other actions to compel arbitration and are governed by *some* statute of limitations, should the federal courts apply the six-month statute of limitations established by Section 10(b) of the National Labor Relation Act, 29 U.S.C. §160(b), or look to disparate state laws for the relevant limitations period? Recognizing the need for prompt and uniform treatment of labor disputes, the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits apply the NLRA's six-month limitations period to actions to compel arbitration.[3] The Tenth and Eleventh Circuits, on the other hand, look to state law to supply the limita-

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[3]*See Communications Workers of America v. Western Electric Co.*, 860 F.2d 1137, 1142-1145 (1st Cir. 1988); *Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2d Cir. 1987); *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.*, 736 F.2d 896, 901 (3rd Cir. 1984); *A.P. Green*, 895 F.2d at 1054-1055 (5th Cir. 1990); *McCreedy v. Local Union 971, UAW*, 809 F.2d 1232, 1237-39 (6th Cir. 1987); *United Food & Commercial Workers Local 100A v. John Hofmeister and Son, Inc.*, 950 F.2d 1340, 1347 (7th Cir. 1991); *Alcorn v. Burlington N.R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Local Joint Executive Board v. Exber, Inc.*, 994 F.2d 674, 674-75 (9th Cir. 1993).

tions period.[4]

The split among the circuits on both of these issues and the important federal policies at stake make this case appropriate for resolution by this Court. *See* Sup. Ct. R. 10.1(a).

I. THE STRONG FEDERAL INTEREST IN THE UNIFORM AND SPEEDY RESOLUTION OF LABOR DISPUTES MANDATES THAT ACTIONS TO COMPEL A RETURN TO ARBITRATION BE SUBJECT TO SOME STATUTE OF LIMITATIONS.

This Court has emphasized that two central labor policies of federal labor law are speed and uniformity in resolution of labor disputes. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 168 (1983)("relatively rapid final resolution of labor disputes favored by federal law"); *id.* at 171 (discussing the "'need for uniformity among the procedures followed for similar claims'"); *see also Robinson v. Pan American Airways*, 777 F.2d 84, 87 (2d Cir. 1987) ("two key policy goals" of federal labor law are "speed and uniformity").

Both policies are frustrated by the Eighth Circuit's refusal here to apply any statute of limitations to actions to compel a return to arbitration. If the Eighth Circuit's decision is allowed to stand, employers and unions will be subject to motions to compel a return arbitration without any hope of repose. Any party wishing to arbitrate any issue would be free to try to compel a return to arbitration at *any* time.

Furthermore, as a result of the split in the Courts of Appeals created by the Eighth Circuit's decision, employers and

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[4]*See International Brotherhood of Teamsters, Local Union 955 v. Sambol Packing Co.*, No. Civ. 92-2338-JWL, 1993 WL 34696 at *2 (D. Kan. Jan. 11, 1993) (citing *Garcia v. Eidal Int'l Corp.*, 808 F.2d 717, 719 (10th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987)); *United Paperworkers Int'l, Local 395 v. ITT Rayonier, Inc.*, 931 F.2d 832, 836 (11th Cir. 1991).

unions in the Eighth Circuit are treated differently than employers and unions located everywhere else. For employers such as Morrell, with facilities in states in different circuits, such a rule would mean that different limitations periods would apply to grievances filed at the employer's various facilities, even though its employees might be represented by the same union and be involved in the same dispute under the same collective bargaining agreement as employees at other facilities. Moreover, the question of whether a statute of limitations applies within the Eighth Circuit itself will depend entirely on whether the effort to compel arbitration is characterized as a "return" to arbitration or an "initiation" of arbitration.[5]

The source of the clear cut circuit split is the Eighth Circuit's decision to treat actions to compel a return to arbitration differently than all other actions to compel arbitration. Under the Eighth Circuit's ruling, the former are not subject to any statute of limitations, while the latter are subject -- in the Eighth (and seven other circuits) -- to the NLRA's six-month limitations period. *Morrell III*, 992 F.2d at 207 n.3. The mere fact that the parties have previously submitted to arbitration is no justification for jettisoning the statute of limitations when one party wants to return to arbitration over the other party's objection.

Confronted with similar circumstances, the Fifth, Seventh, and Eleventh Circuits have recognized that the characterization of the action is of no consequence and have applied at least some statute of limitations regardless of whether the motion to compel

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[5] This is exactly what happened below. The Eighth Circuit recognized that if it had characterized the unions' action as one to compel the initiation of arbitration -- as Morrell had urged -- the action would have been subject to the NLRA's six-month statute of limitation under *Alcorn v. Burlington N.R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989). Solely because the Eighth Circuit characterized the unions' action as one to compel a return to arbitration, the court decided that no statute of limitations was applicable. *Morrell III*, 992 F.2d at 207 n.3.

is characterized as an initiation of arbitration or a return to arbitration. Thus, in *A.P. Green*, the Fifth Circuit cited the strong federal interest in the uniform and rapid resolution of labor disputes and upheld the dismissal of a petition to compel a return to arbitration on the ground that it was time-barred by the NLRA's six-month statute of limitations. 895 F.2d at 1055. Likewise, in *Alberici-Eby*, the Seventh Circuit relied on the need to encourage "prompt resolution of labor disputes" and applied the NLRA's six-month limitations period to preclude an employer's attempt to force one of several unions to return to arbitration to address grievances that had already been submitted. 992 F.2d at 731-32. Finally, in *AAA Plumbing*, the Eleventh Circuit held that, while timely, a union's attempt to "return to arbitration" to take up its objections to an arbitrator's backpay calculations was subject to Alabama's statute of limitations. 991 F.2d at 1547-48.

In all relevant respects, the situation confronting the Eighth Circuit below was the same as those confronting the Fifth, Seventh, and Eleventh Circuits. The Eighth Circuit decided in *Morrell II* that the arbitrator's award must be overturned in part because it was premised on the arbitrator's conclusion that the strikes were valid, a finding that was contrary to the jury's prior verdict. *Morrell II*, 913 F.2d at 562-63. After certiorari was denied, the unions sought to return to the arbitrator, arguing that they should prevail on their grievances, regardless of whether the strikes were in breach of the Agreement. Morrell refused to arbitrate on the ground that no arbitrable issues remained, and the unions never took any action to compel Morrell to return to arbitration. Instead of holding that the unions' claims were time-barred by the unions' delay, however, the Eighth Circuit held that actions to compel a return to arbitration are not governed by any statute of limitations. *Morrell III*, 992 F.2d at 207 n.3. This decision is not only contrary to the rule in three other Courts of Appeals, but also flies in the face of federal labor policy favoring

the uniform and speedy resolution of labor disputes.[6]

The Eighth Circuit's break with the law of at least the Fifth, Seventh, and Eleventh Circuits threatens to undermine the uniformity of federal labor policy. *See DelCostello*, 462 U.S. at 171; *Robinson v Pan American Airways*, 777 F.2d at 87-88. The court's refusal to apply any limitations period to actions to compel a return to arbitration also subverts the central role speedy arbitration was intended to play in federal labor policy. In *DelCostello*, this Court stressed that arbitrable disputes must be resolved quickly because federal labor policy's heavy reliance on "grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision . . . could suddenly be called into question . . . years later." *DelCostello*, 462 U.S. at 169 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 64 (1981)).

Just as this Court warned in *DelCostello*, the Eighth Circuit's refusal to apply any statute of limitations to motions to compel a return to arbitration threatens to render the grievance machinery in collective bargaining agreements unworkable. Under the rule of the decision below, a party could force another

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[6]The Eighth Circuit's reliance on *Toyota v. Automobile Salesmen's Union, Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987), *modified*, 856 F.2d 1572 (9th Cir.), *cert. denied*, 486 U.S. 1043 (1988) highlights the appellate court's error. In *Toyota*, the employer, after giving every indication that it intended to participate in an arbitration, refused to participate at the very last minute. The arbitrator proceeded without the employer and ruled against it on the merits. The Ninth Circuit held that it was not *per se* impermissible for the arbitrator to proceed *ex parte*, but refused to consider whether the union's grievance was timely: "The issue is not whether [the arbitrator] had jurisdiction over the dispute, but rather whether he could proceed without Toyota present." *Id.* at 754. Thus, *Toyota* does not speak to the issue of timeliness at all, let alone to the issue of whether motions to compel a return to arbitration are not subject to any statute of limitations.

to return to arbitration at any time, even years after the refusal to return to arbitration. Indeed, here, six years after the strikes at issue, Morrell still does not know if it will be compelled to reinstate, with backpay, strikers who have already been adjudicated to have breached the parties' labor agreement. When Congress was crafting federal labor policy, it never intended industrial disputes to fester interminably. *See Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2nd Cir. 1987) ("Six years is simply too long to allow industrial disputes to fester"); *Robinson*, 777 F.2d at 89 ("speedy" resolution of disputes arising out of "labor-management relationship . . . is highly desirable").

The Eighth Circuit's decision that no statute of limitations applies to actions to compel a return to arbitration is at odds with the law of other Courts of Appeals and with the federal labor policy. Accordingly, this Court should grant certiorari to review the Eighth Circuit's refusal to apply any statute of limitations and to resolve the split among the Courts of Appeals on this issue.

II. THE STRONG FEDERAL INTEREST IN THE UNIFORM AND SPEEDY RESOLUTION OF LABOR DISPUTES MANDATES THAT ALL ACTIONS TO COMPEL ARBITRATION BE SUBJECT TO THE NLRA'S SIX-MONTH STATUTE OF LIMITATIONS.

In addition to resolving the issue of whether actions to compel a return to arbitration are subject to some limitations period, this Court should also resolve a split among the Courts of Appeals concerning which statute of limitations -- the NLRA's six-month limitations period or one borrowed from state law -- should apply. Believing that no statute of limitations was applicable, the Eighth Circuit did not reach this issue. If this Court grants certiorari and agrees with Morrell on the first issue, it can and should resolve this second conflict among the circuits as well. Eight circuits -- the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth -- apply the NLRA's statute of limitations to actions to compel arbitration. Two circuits, the Tenth and Eleventh, apply a state limitations period.

Until resolved by this Court, this split will continue to

undermine the federal policies of uniform and prompt resolution of federal labor disputes. In order to protect these policies, this Court should grant the petition and rule that the six-month statute of limitations found in Section 10(b) of the NLRA, 29 U.S.C. §160(b) applies to all actions to compel arbitration no matter how they are characterized. First, reliance on state law is inadequate because statutes of limitation vary widely from state to state, frustrating the uniform resolution of labor disputes.[7] Employers and unions across the country, therefore, would be subject to an inconsistent patchwork of 50 limitations periods.

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[7] *See e.g., Communications Workers of America v. Western Electric Co.*, 860 F.2d 1137, 1139 (1st Cir. 1988)(rejecting six-year limitations period for actions arising in Massachusetts); *Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 36-37 (2d Cir. 1987)(rejecting New York's six-year limitation period for contract actions); *Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.*, 736 F.2d 896, 901 (3d Cir. 1984)(rejecting Pennsylvania's six-year statute of limitations for contract actions); *A.P. Green*, 895 F.2d at 1055 (rejecting Texas' four-year residual limitations period); *McCreedy v. Local Union 971, UAW*, 809 F.2d 1232, 1233 (6th Cir. 1987)(rejecting Ohio's six-year limitations period for written contracts); *United Food & Commercial Workers Local 100A v. John Hofmeister & Sons, Inc.*, 950 F.2d 1340, 1347 (7th Cir. 1991)(rejecting Illinois' five-year statute of limitations for oral contracts); *Teamsters Union Local 315 v. Great Western Chemical Co.*, 781 F.2d 764, 767 (9th Cir. 1986) (rejecting union's request for application of California's four-year limitations period for written contracts and rejecting the employer's request for application of California's 100-day limitations period for correcting or vacating an arbitration award). *International Brotherhood of Teamsters, Local Union 955 v. Sambol Packing Co.*, No. Civ. 92-2338-JWL, 1993 WL 34696 at *2 (D. Kan. Jan. 11, 1993)(relevant limitation period for actions arising in Kansas is three years); *United Paperworkers Int'l, Local 395 v. ITT Rayonier, Inc.*, 931 F.2d 832, 836 (11th Cir. 1991)(relevant limitations period for actions to compel arising in Florida is one year).

This inconsistency would be especially acute for employers and unions having facilities or affiliates in several states. Second, many states have long limitations periods, frustrating the speedy resolution of labor disputes.[8] Nationwide application of the NLRA's six-month statute of limitations period, on the other hand, would promote both speed and uniformity.

In *DelCostello*, this Court promulgated the applicable test for deciding when federal law provides a more appropriate statue of limitations:

> [w]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

DelCostello, 462 U.S. at 172. Application of the NLRA's statute of limitations to actions to compel arbitration, however such proceedings are characterized, passes this test.

First, there is no closer analogy in state law. Actions to compel labor arbitration typically involve issues that are unique to labor law, such as unfair labor practices. As the First Circuit explained in *Communications Workers of America v. Western Electric Co.*, 860 F.2d 1137, 1142 (1st Cir. 1988): "The grievances underlying claims for arbitration typically involve unfair labor

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[8]The various state limitations periods considered by the Courts of Appeals range from twice as long as the NLRA's six-month statute (one year) in Florida, *United Paperworkers Int'l, Local 395 v. ITT Rayonier, Inc.*, 931 F.2d 832, 836 (11th Cir. 1991), to 12 times as long (six years), for example, in Massachusetts and Ohio. *Communications Workers of America v. Western Electric Co.*, 860 F.2d 1137, 1139; *McCreedy v. Local Union 971, UAW*, 809 F.2d 1232, 1233 (6th Cir. 1987). Allowing labor disputes to fester this long is not what Congress intended.

practices." The Second Circuit has likewise made clear that "because many grievances involve activity that may also constitute an unfair labor practice under the National Labor Relations Act, it makes sense to have a common statute of limitations for claims arising under Section 10(b) and actions to compel arbitration." *Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2d Cir. 1987). The Third Circuit has also stated this same principle:

> Moreover, grievances often involve an alleged activity which is also an unfair labor practice over which the National Labor Relations Board has jurisdiction. The Board frequently defers the consideration of such charges to the arbitral forum if it is available. . . . Thus it makes a great deal of sense to have a common statute of limitations for unfair labor practice charges and for suits to compel arbitration.

Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp., 736 F.2d 896, 901 (3d Cir. 1984)(citing *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Collyer Insulated Wire*, 192 N.L.R.B. 837, 842 (1971)).[9]

Second, the NLRA's six-month limitations period is intended to promote the federal interest in stable bargaining relationships and private dispute resolution. *A.P. Green*, 895 F.2d at 1055. The Section 301(a) provision for compelling arbitration promotes this same interest. *Id.* By contrast, state statutes of limitation for contract actions were not crafted with federal labor policy in mind. Because Congress crafted the NLRA's six-month limitations period to advance national labor policy, it is more closely analogous to an action to compel arbitration under

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[9]This case presents the exact situation described by the First, Second and Third Circuits. Indeed, the unions filed unsuccessful unfair labor practice charges against Morrell based on the same underlying facts that form the basis for their grievances here.

Section 301(a) than any state limitations period for run-of-the-mill contract suits could ever be. *Id.*

Third, the federal interests of speed and uniformity make the federal limitations period more appropriate. The NLRA's six-month statute of limitations not only encourages the prompt resolution of grievances, but also establishes the proper balance "'between the national interests in stable bargaining relationships and finality of private settlements,'" (*DelCostello*, 462 U.S. at 171)(citations omitted), "and a party's interest in invoking the arbitral process under the collective bargaining system." *Harrington*, 820 F.2d at 37.

Fourth, the practicalities of litigation require application of a single, predictable and uniform limitations period. Otherwise, a single dispute between an employer and a union under one collective bargaining agreement covering plants in several different states would be subject to wholly different statutes of limitations. Indeed, as the Supreme Court stated in *Burnett v. Grattan*, 468 U.S. 42, 52 n.14 (1984), "[t]he importance of uniformity in the labor law field, and 'the realities of labor relations and litigation informed our decision [in *DelCostello*] *not* to adopt a state statute of limitations that would be at odds with the purpose of the substantive federal law.'"

Because the Eighth Circuit held that *no* statute of limitations was applicable, it did not determine which statute of limitations should govern actions to compel a return to arbitration. As shown in Section I above, however, some statute of limitations is necessary in order to advance the federal labor policies in favor of uniform and speedy resolution of labor disputes. These same policies also mandate application of NLRA's six-month statute of limitations to all actions to compel arbitration, however such actions are characterized.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

JOHN MORRELL & COMPANY,

Appellee,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 304A, AFL-CIO AND CLC; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Appellants.

Before McMILLIAN, *Circuit Judge,* LAY, *Senior Circuit Judge,* and BOWMAN, *Circuit Judge.*

LAY, *Senior Circuit Judge*

From May through November of 1987, union workers engaged in a sympathy strike at John Morrell & Co.'s Sioux Falls, South Dakota, plant in support of a union strike at another Morrell plant. When the strikers attempted to return to work, Morrell delayed their return. Local 304A of the United Food and Commercial International Workers and the United Food and Commercial Workers International Union (the Unions) then filed grievances pertaining to reinstatement, seniority rights and other matters. The company denied the grievances. The workers sought arbitration under the collective bargaining agreement. The arbitrator sustained the grievances and found the strikes were lawful. In the meantime, Morrell sued the Unions. A jury found the strikes were unlawful and awarded $24.6 million

to the end.

The company thereafter moved to vacate the arbitrator's award. The district court ruled that the arbitrator exceeded the scope of his authority and that the jury verdict had preclusive effect. *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 708 F. Supp. 273 (D.S.D. 1989). This court affirmed the district court on both grounds. *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990) *(Morrell II)*, *cert. denied*, __ U.S. __, 111 S. Ct. 1683, 114 L.Ed.2d 78 (1991).[1]

The Unions thereafter renewed their grievances before the arbitrator on the ground that the lawfulness of the strike was not germane to their success in arbitration. Morrell refused arbitration and sought a declaratory judgment in the district court that the previous arbitration had covered all issues and the Unions had lost. The district court agreed. It held the Unions' "right to arbitration would depend upon the validity of th[e sympathy] strike." This appeal followed. We reverse.

We agree with Morrell that the district court had jurisdiction to determine the arbitrability of the dispute. *International Ass'n of Machinists & Aerospace Workers v. Republic Airlines*, 829 F.2d 658, 659-60 (8th Cir. 1987)(relying on *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)).

In *Morrell II* we held that the arbitrator exceeded his authority by determining the strike's legality. 913 F.2d at 560-61. This is the law of the case. We stated: There was evidence that the parties indicated at that time that they did not want the arbitrator to address the issue of the legality of sympathy strikes. Each party insisted that it would prevail in arbitration of the recall issue regardless of the outcome of the appeal of the liability verdict, the appeal currently before us.... Indeed, when the parties stated the issues in their opening briefs for the arbitrator, neither party referred to

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[1]In *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 804 F.2d 457 (8th Cir. 1986)(*per curiam*)(*Morrell I*), *cert. denied*, 481 U.S. 1014, 107 S. Ct. 1889, 95 L.Ed.2d 496 (1987), we vacated a preliminary injunction halting an earlier sympathy strike at Morrell's Sioux Falls plant.

the issue of the legality of the strikes.

The arbitrator, however, first determined the legality of the strike, and then did not address the Unions' argument that the grievance should be upheld even if the strike was illegal.[2]

As the Supreme Court said in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.10, 108 S. Ct. 364, 372 n.10, 98 L.Ed.2d 286 (1987), courts should not foreclose further proceedings before an arbitrator even if the arbitrator's prior "procedural aberrations rise to the level of affirmative misconduct" requiring a court to vacate an award. That the parties in this case contemplated further proceedings before the arbitrator is plain from his decision. The arbitrator expressly left open such questions as whether the replacement workers were temporary or permanent, Arbitrator's Award, No. 218-87, slip op. at 20 (Rentfro, Arb. Nov. 5, 1988), and a section of the award is titled, "Remaining Issues," *id.* at 25. As we have already stated, the arbitrator never addressed the Unions' argument that they should prevail even if the strike was illegal because the arbitrator determined the strike was legal. In *Morrell II* we vacated the arbitrator's finding on the legality of the strike, and we now find that the Unions have not waived returning to the arbitrator for further proceedings in accordance with the mandate set out in our prior opinion.[3]

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[2]The company agrees that as a matter of federal law, the rights to arbitration in the first instance did not depend on the validity of the strike. *See Local Union No. 721, United Packinghouse, Food & Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 84 S. Ct. 773, 11 L.Ed.2d 680 (1964)(holding that a union does not waive its right to arbitrate grievances simply because it engages in an illegal strike). It thus observes that it agreed to arbitrate this question, but it argues that it need not arbitrate it a second time.

[3]Morrell asks us to affirm the trial court on the alternative ground that the Unions' effort is barred by the statute of limitations. The district court did not decide this issue. We have held that actions to compel arbitration are governed by the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). *Alcorn v. Burlington N.R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989). Morrell argues that the Unions did not seek to compel its presence at the arbitra-

For the above reasons, the judgment of the district court is reversed.

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tor's table within six months of its refusal to return to arbitration. However, Morrell has cited us no authority suggesting the six-month statute of limitations applies when one party abandons an ongoing arbitration. Under such circumstances, the arbitration can proceed even if the party refuses to participate further. *Toyota v. Automobile Salesman's Union Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043, 108 S. Ct. 2036, 100 L.Ed.2d 620, *modified*, 856 F.2d 1572 (9th Cir. 1988). We thus hold the statute of limitations does not apply in such circumstances.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

JOHN MORRELL & CO.,

Plaintiff,

v.

LOCAL UNION 304A OF THE
UNITED FOOD AND COMMERCIAL WORKERS,
AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL-CIO AND CLC,

Defendants.

MEMORANDUM OPINION AND JUDGMENT FOR PLAINTIFF

Plaintiff John Morrell & Co. (Morrell) has filed a complaint for declaratory relief under the Labor-Management Relations Act, 29 U.S.C. § 185. Plaintiff seeks a declaration that issues defendants Local Union 304A of the United Food and Commercial Workers, AFL-CIO and CLC and United Food and Commercial Workers International Union AFL-CIO and CLC (Union) seek to arbitrate are not arbitrable. The issue is whether or not defendants' attempt to seek arbitration of the collective bargaining agreement in effect at the time of the May 1987-November 1987 sympathy strike has been foreclosed by the judicial finding that the sympathy strike was illegal.

Subject matter jurisdiction is based on section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and the Declaratory Judgment Act, 29 U.S.C. § 2201.

Cross motions for summary judgment have been filed. Defendants' motion is court document #19 and plaintiff's motion is court document #22.

This is yet another of the ongoing disputes arising out of the 1985-88 collective bargaining agreement between the parties and the illegal sympathy strike which took place from May to November of 1987.

No useful purpose will be served by a recital of the history of the litigation arising out of the collective bargaining agreement. The final chapter was written in the well-reasoned opinion by Judge John R. Gibson in *Morrell v. Local Union 304A*, 913 F.2d 544 (8th Cir. 1990) *cert. denied*, 111 S. Ct. 1683 (1991).

Defendants now seek to resurrect alleged arbitrable issues under the contract alleging that such issues have not been resolved by the Eighth Circuit Court of Appeals decision.

This Court has examined both motions for summary judgment, the statements of undisputed facts supporting the respective motions, and the memorandum briefs of each party.

The collective bargaining agreement of 1985-88 was violated by the Union as representative of its employees by an illegal sympathy strike in 1987. Any rights to arbitration would depend upon the validity of that strike. The strike was declared to be in violation of the collective bargaining agreement by a jury, by this Court, and more importantly, affirmed by the Eighth Circuit Court of Appeals. The Court of Appeals decision became effective following the denial of a writ of certiorari by the Supreme Court of the United States. There plain and simply remains nothing to arbitrate. Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiff is granted.

IT IS FURTHER ORDERED that the motion for summary judgment of defendants is denied.

IT IS FURTHER ORDERED that judgment is rendered in favor of plaintiff with costs to be assessed in favor of plaintiff and against defendants in the amount of $_____, to be inserted by the Clerk.

Dated this 24th day of March, 1992.

BY THE COURT:

_____

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE